



## INCIDENTS INVOLVING THE 1992 FUND

### PRESTIGE

#### Note by the Director

**Summary:**

The shipowner's P&I insurer and the 1992 Fund have established Claims Handling Offices in La Coruña (Spain) and Bordeaux (France). Claims totalling €632 million (£428 million)<sup><1></sup> have been received by the Office in Spain and claims totalling €18.4 million (£80 million) have been received by the Office in France. The Portuguese Government submitted claims for €4.3 million (£2.9 million) in respect of clean-up and preventive measures in Portugal.

The total amount of the approved claims arising from the *Prestige* incident will significantly exceed the total amount of compensation available, 135 million SDR corresponding to €171.5 million (£116 million). In May 2003 the Executive Committee decided that the 1992 Fund's payments should be limited to 15% of the loss or damage actually suffered by the respective claimants, as assessed by the experts engaged by the Fund and the insurer.

At its October 2005 session the Executive Committee decided: a) that the level of the 1992 Fund's payments should be increased from 15% to 30% of the loss or damage actually suffered by the respective claimants; b) that an amount of €133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned in the following manner: Spain 85.9%, France 13.55%, Portugal 0.55%; c) to authorise the Director to pay the Spanish Government €57 365 000 (£39 million); and d) that the increase in the level of payments and the payment to the Spanish State were subject to the Governments concerned providing certain undertakings and guarantees.

In January 2006 the French Government provided the required undertaking. In March 2006 the Spanish Government provided the required undertaking and bank guarantee. The Portuguese Government confirmed that it would not provide the required guarantee and that it would only request payment of 15% of the assessed amount of its claim. As a consequence the 1992 Fund increased the level of payments to 30% of the amount assessed by the experts engaged by the shipowner's P&I insurer and the 1992 Fund and made a payment of €6 365 000 (£38.5 million) to the Spanish Government.

In August 2006 the 1992 Fund settled the claim of the Portuguese Government at €2.2 million (£1.5 million) and made a payment of €328 488 (£222 600), corresponding to 15% of the assessed amount.

**Action to be taken:**

Information to be noted.

<1> In this document conversion of currencies has been made on the basis of exchange rate as at 13 September 2006 (€ = £0.6777) except in respect of payments made by the 1992 Fund where the conversion has been made at the rate on the date of payment.

## **1 The incident**

- 1.1 On 13 November 2002 the Bahamas registered tanker *Prestige* (42 820 GT), carrying 76 972 tonnes of heavy fuel oil, began listing and leaking oil while some 30 kilometres off Cabo Finisterre (Galicia, Spain). On 19 November, whilst under tow away from the coast, the vessel broke in two and sank some 260 kilometres west of Vigo (Spain), the bow section to a depth of 3 500 metres and the stern section to a depth of 3 830 metres. The break-up and sinking released an estimated 25 000 tonnes of cargo. Over the following weeks oil continued to leak from the wreck at a declining rate. It was subsequently estimated by the Spanish Government that approximately 13 800 tonnes of cargo remained in the wreck.
- 1.2 Due to the highly persistent nature of the *Prestige's* cargo, released oil drifted for extended periods with winds and currents, travelling great distances. The west coast of Galicia (Spain) was heavily contaminated and oil eventually moved into the Bay of Biscay affecting the north coast of Spain and France.
- 1.3 Major clean-up operations were carried out at sea and on shore in Spain. Significant clean-up operations were also undertaken in France. Clean-up operations at sea were undertaken off Portugal.
- 1.4 For details of the clean-up operations and the impact of the spill reference is made to documents 92FUND/EXC.24/5, 92FUND/EXC.24/5/Add.1 and 92FUND/EXC.25/3/1.
- 1.5 The *Prestige* had insurance for oil pollution liability with the London Steamship Owners' Mutual Insurance Association (London Club).
- 1.6 Between May 2004 and September 2004 some 13 000 tonnes of cargo were removed from the forepart of the wreck. Approximately 700 tonnes were left in the aft section.

## **2 Claims Handling Offices**

- 2.1 In anticipation of a large number of claims, and after consultation with the Spanish and French authorities, the London Club and the 1992 Fund established Claims Handling Offices in La Coruña (Spain) and Bordeaux (France).
- 2.2 Since the manager of the Claims Handling Office in La Coruña has accepted an offer of employment elsewhere the Fund has appointed one of the local experts who has been engaged by the London Club and the 1992 Fund to assess claims for compensation to take over the management of that Office. As a consequence the Claims Handling Office has been moved to the local expert's office, which is nearby.
- 2.3 The Director has decided to close the Claims Handling Office in Bordeaux on 30 September 2006. The activities of that Office will be carried out from Lorient by the person who currently manages the *Erika* Claims Handling Office.

## **3 Shipowner's liability**

The limitation amount applicable to the *Prestige* under the 1992 Civil Liability Convention is approximately 18.9 million SDR or €2 777 986 (£15.4 million). On 28 May 2003 the shipowner deposited this amount with the Criminal Court in Corcubi3n (Spain) for the purpose of constituting the limitation fund required under the 1992 Civil Liability Convention.

## **4 Maximum amount available under the 1992 Fund Convention**

- 4.1 The maximum amount of compensation under the 1992 Civil Liability Convention and the 1992 Fund Convention is 135 million SDR per incident, including the sum paid by the shipowner and his insurer (Article 4.4 of the 1992 Fund Convention). This amount should be converted into

the national currency on the basis of the value of that currency by reference to the SDR on the date of the decision of the Assembly as to the first date of payment of compensation.

- 4.2 Applying the principles laid down in previous cases, the Executive Committee decided in February 2003 that the conversion in the *Prestige* case should be made on the basis of the value of that currency vis-à-vis the SDR on the date of the adoption of the Committee's Record of Decisions of that session, ie 7 February 2003. As a result 135 million SDR corresponds to €171 520 703 (£116 million).

## 5 Level of payments

### *Consideration in May 2003*

- 5.1 At the Executive Committee's 21st session, held in May 2003, it was decided that the 1992 Fund's payments should be limited to 15% of the loss or damage actually suffered by the respective claimants as assessed by the experts engaged by the 1992 Fund and the London Club (document 92FUND/EXC.21/5).

### *Consideration in October 2005*

- 5.2 At its October 2005 session the Executive Committee agreed to the Director's proposal as to the increase in the level of payments, the distribution of the amount payable by the 1992 Fund and the provisions of undertakings and guarantees by the Governments of France, Portugal and Spain and decided as follows (document 92FUND/EXC.30/10, paragraph 3.7.73):

1. The level of the 1992 Fund's payments should be increased from 15% to 30% of the loss or damage actually suffered by the individual claimant as assessed by the experts appointed by the 1992 Fund and the London Club.
2. The amount of €133 840 000, representing the total amount payable by the 1992 Fund, minus a reserve of 10%, should be apportioned between the three States concerned as set out in the following table:

State	Apportionment (%)	Apportionment (amounts) (rounded figures)	Bank Guarantees <sup>&lt;2&gt;</sup>
Spain	85.90%	€15 000 000	€78 850 000
Portugal	0.55%	€740 000	€510 500
France	13.55%	€8 100 000	-
Total	100.00%	€133 840 000	-

3. The Director was authorised to pay the Spanish Government €7 365 000 (£39 million), subject to the Spanish Government undertaking to compensate all claimants who had suffered pollution damage in Spain for amounts no less than 30% of the loss or damage, repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain and provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.
4. The Director was authorised to pay the Portuguese Government €740 000 (£500 000), subject to the Portuguese Government undertaking to repay to the 1992 Fund any amount due by it to the 1992 Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal, to indemnify the Fund for

<2> The amounts of the bank guarantees correspond to the differences between the apportioned amounts and 15% of the assessed amounts, ie Spain €15 000 000 - €6 150 000 (€241 million at 15%) = €78 850 000; Portugal €740 000 - €229 500 (€1 530 000 at 15%) = €510 500.

any amounts that it had paid to other claimants for pollution damage in Portugal and to provide the 1992 Fund with a bank guarantee to cover the difference between the amount paid to it by the Fund and 15% of the assessed amount.

5. The Director was authorised to pay each claimant in France, except the French Government, 30% of the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court, subject to the French Government undertaking to accept a reduction in the compensation to which it would be entitled, up to the amount of its admissible claim, to protect the 1992 Fund against overpayment to claimants having suffered damage in France, if the Executive Committee were to decide to reduce the level of payments.
6. The bank guarantees to be provided by the Portuguese and Spanish Governments should be given by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines and fulfil the other criteria and generally be to the satisfaction of the Director.

*Developments after the October 2005 session*

- 5.3 In December 2005 the Portuguese Government informed the 1992 Fund that it would not provide any bank guarantee and would as a consequence only request payment of 15% of the assessed amount of its claim.
- 5.4 In January 2006 the French Government gave the required undertaking in respect of its own claim.
- 5.5 In March 2006 the Spanish Government gave the required undertaking and bank guarantee, and as a consequence a payment of €6 365 000 (£38.5 million) was made in March 2006. As requested by the Spanish Government, the 1992 Fund retained €1 million in order to make payments at the level of 30% of the assessed amounts in respect of the individual claims that had been submitted to the Claims Handling Office in Spain. These payments will be made on behalf of the Spanish Government in compliance with its undertaking, and any amount left after paying all the claimants in the Claims Handling Office would be returned to the Spanish Government. If the amount of €1 million were to be insufficient to pay all the claimants who had submitted claims to the Claims Handling Office, the Spanish Government has undertaken to make payments to these claimants up to 30% of the amount assessed by the London Club and the 1992 Fund.
- 5.6 Since the conditions required had been met, the Director increased the level of payments to 30% of the established claims for damage in Spain and in France (except in respect of the French Government's claim), with effect from 5 April 2006.

**6 Claims for compensation**

*Spain*

- 6.1 As at 15 September 2006 the Claims Handling Office in La Coruña had received 837 claims totalling €632 million (£428 million). These include eight claims from the Spanish Government totalling €578.7 million (£392 million) submitted during the period October 2003 – August 2006. In September 2005 a group of 58 associations from Galicia, Asturias and Cantabria representing 13 600 fishermen and shellfish harvesters withdrew a claim for €132 million (£89 million) against the 1992 Fund, since the associations had signed settlement agreements with the Spanish State on behalf of the victims. A number of other claimants who had settled with the Spanish Government under the Royal Decrees referred to in paragraph 9.3 have also withdrawn their claims.
- 6.2 The claims by the Spanish Government relate to costs incurred in respect of at sea and onshore clean-up operations, removal of the oil from the wreck, compensation payments to fishermen and shellfish harvesters, tax relief for businesses affected by the spill, administration costs, costs relating to publicity campaigns and costs incurred by local authorities and paid by the Government. The claims originally included items for the cost of clean-up operations in the Atlantic National Park

amounting to €1.9 million (£8.1 million). These items have been withdrawn since funding for these operations had been obtained from another source. The claim for the removal of the oil from the wreck, initially for €109 million (£74 million), was reduced to €24 million (£16.3 million) to take account of funding obtained from another source (see paragraph 7.1).

6.3 The table below provides a breakdown of the different categories of claims received by the Claims Handling Office in La Coruña.

Category of claim	No. of claims	Amount claimed €
Property damage	232	2 142 259
Clean-up	17	4 335 197
Mariculture	14	19 096 101
Fishing and shellfish gathering	179	4 718 023 <sup>&lt;3&gt;</sup>
Tourism	14	688 303
Fish processors/vendors	299	20 137 270
Miscellaneous	74	1 761 785
Spanish Government	8	578 741 902 <sup>&lt;4&gt;</sup>
<b>Total</b>	<b>837</b>	<b>631 620 840</b>

6.4 The first claim received from the Spanish Government in October 2003 for €383.7 million (£260 million) was assessed on an interim basis by the Director in December 2003 at €107 million (£72.5 million), and the 1992 Fund made a payment of €16 050 000 (£11.1 million), corresponding to 15% of the interim assessment. The Director also made a general assessment of the total of the admissible damage in Spain, and concluded that the admissible damage would be at least €303 million (£205 million). On that basis, and as authorised by the Assembly, the Director made an additional payment of €41 505 000 (£28.5 million), corresponding to the difference between 15% of €383.7 million or €7 555 000 and 15% of the preliminarily assessed amount of the Government's claim, €16 050 000. That payment was made against the provision by the Spanish Government of a bank guarantee covering the above-mentioned difference (ie €41 505 000) from the Instituto de Credito Oficial, a Spanish bank with high standing in the financial market, and an undertaking by the Spanish Government to repay any amount of the payment decided by the Executive Committee or the Assembly.

6.5 Since December 2003, a number of meetings have been held with representatives of the Spanish Government and a considerable amount of further information has been provided in support of its claims. Cooperation with representatives of the Spanish Government is continuing and progress is being made on the assessment of all the claims submitted by the Government.

6.6 Of the other claims submitted, 72.5% have been assessed. Many of the remaining claims lack sufficient supporting documentation and further documentation has been requested from the claimants. Five hundred and seven of these other claims, totalling €37.1 million (£25 million), were approved for €3.4 million (£2.3 million). Interim payments totalling €470 567 (£300 000) have been made in respect of 242<sup><5></sup> of the assessed claims, mainly at 30% of the assessed amount. The remaining approved claims await a response from the claimants or are being reassessed following claimants' disagreements with the assessed amounts. One hundred and fifty-seven claims totalling €23.7 million (£16 million) have been rejected, the majority because the claimant has not demonstrated that a loss had been suffered.

<3> One claim totalling €132 million (£90 million) from a group of 58 associations has been withdrawn following a settlement with the Spanish Government (see paragraph 6.1).

<4> After certain reductions, in particular the one referred to in paragraph 6.2.

<5> Compensation payments made by the Spanish Government to claimants have been deducted when calculating the interim payments.

- 6.7 At the Executive Committee's May 2004 session the Spanish delegation stated that 67 towns had requested compensation totalling €37.6 million (£25.4 million) and that the four affected regions had estimated their damage at €150 million (£102 million). In August 2006, the Spanish Government submitted to the Claims Handling Office a claim for the costs incurred by the 67 towns that had been paid by the Government, 51 in Galicia, 14 in Asturias and two in Cantabria, for a total of €5.8 million (£3.9 million). The 1992 Fund's experts are examining the claim.
- 6.8 In May 2006 the Spanish Government submitted to the 1992 Fund a claim for the cost incurred in the payment of the claims assessed by the Consorcio de Compensación de Seguros (Conсорcio)<sup><6></sup> (cf paragraphs 9.6 – 9.8).

*France*

- 6.9 By 15 September 2006, 472 claims totalling €18.4 million (£80.2 million) had been received by the Claims Handling Office in Bordeaux. The table below provides a breakdown of the different types of claims.

Category of claim	No. of claims	Amount claimed €
Property damage	9	87 772
Clean-up	57	10 461 115
Mariculture	125	12 216 223
Shellfish gathering	3	116 810
Fishing boats	59	1 601 717
Tourism	194	25 152 361
Fish processors/vendors	9	301 446
Miscellaneous	15	982 860
French Government	1	67 499 154
<b>Total</b>	<b>472</b>	<b>118 419 458</b>

- 6.10 Of the 472 claims submitted to the Claims Handling Office, 82% had been assessed by 15 September 2006. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Three hundred and ninety-one claims had been assessed at €45 million (£30.5 million). Three hundred and eighty-four claims had been approved for €44.5 million (£30 million) and interim payments totalling €2.4 million (£1.6 million) had been made at 30% of the assessed amounts in respect of 238 of the approved claims. The remaining approved claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Forty-four claims totalling €2.1 million (£1.4 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.
- 6.11 One hundred and twenty-one claims had been submitted by oyster farmers totalling €1.6 million (£1.1 million) for losses allegedly suffered as a result of market resistance due to the pollution. The experts engaged by the London Club and the 1992 Fund had examined these claims and 117 of them, totalling €1.1 million (£750 000), had been assessed at €394 595 (£267 000). Payments totalling €65 847 (£44 600) had been made in respect of 109 of these claims at 30% of the assessed amounts. Four claims were not supported by any documentation and requests have been made to these claimants to provide detailed information to support their claims.
- 6.12 The Claims Handling Office had received 194 tourism-related claims totalling €25.2 million (£17.1 million). One hundred and sixty-three of these claims had been assessed at a total of €8.8 million (£6 million). One hundred and fifty-eight claims had been approved for €8.6 million

<sup><6></sup> A state-owned insurance organisation set up to pay claims for damage not normally covered by commercial insurance policies, such as damage due to terrorist activities or natural disasters.

(£5.8 million) and interim payments totalling €1.8 million (£1.2 million) had been made at 30% of the assessed amounts in respect of 93 claims.

- 6.13 In May 2004, the French Government submitted a claim for €67.5 million (£45.7 million) in relation to the costs incurred for clean-up and preventive measures. The 1992 Fund and the London Club have provisionally assessed the claim at €31.2 million (£21.1 million). A request for further information was sent to the French Government in August 2005 in order to enable the experts appointed by the 1992 Fund and the London Club to complete the assessment. Such information and further supporting documentation was received in February 2006. The Fund's experts are carrying out a detailed assessment of the claim.
- 6.14 A further 57 claims, totalling €10.5 million (£7.1 million), had been submitted by local authorities for costs of clean-up operations. Twenty-six of these claims had been assessed and approved at €3.4 million (£2.3 million). Interim payments totalling €303 891 (£200 000) have been made in respect of twenty-one claims at 30% of the assessed amounts.

#### *Portugal*

- 6.15 In December 2003 the Portuguese Government submitted a claim for €3.3 million (£2.2 million) in respect of the costs incurred in clean-up and preventive measures. A meeting was held in July 2004 between representatives of the 1992 Fund and representatives of the Government departments involved. In February 2005, the Portuguese Government provided the 1992 Fund with additional documentation in support of its claim. The additional documentation included a supplementary claim for €1 million (£680 000), also in respect of clean-up and preventive measures. The claims were finally assessed at €2.2 million (£1.5 million). The Portuguese Government accepted this assessment. As the Portuguese Government had decided not to submit a bank guarantee (c.f. paragraph 5.3 above), in August 2006 the 1992 Fund made a payment of €328 488 (£222 600), corresponding to 15% of the final assessment. This does not preclude the payment of further compensation to the Portuguese Government in the event that the Executive Committee were to increase the level of payments unconditionally.

## **7 Claim for costs of removing oil from the wreck**

### *The claim*

- 7.1 The Spanish Government had originally submitted a claim for €109.2 million (£74 million) for the cost of the operation to remove the oil from the wreck of the *Prestige*, including the costs of preparatory work and the feasibility trials conducted in the Mediterranean and at the wreck site. In January 2006 the Spanish Government confirmed that it had been awarded a concession of aid by the European Commission, that it had so far received a total of €50.9 million (£35 million) and that further payments totalling €3.1 million (£22.4 million) were pending. As a result of this concession the Spanish Government reduced its claim to €4.2 million (£16.4 million), of which €4.8 million (£3.3 million) related to the costs incurred in 2003 and €19.4 million (£13.1 million) related to the costs incurred in 2004.

### *Consideration at Committee's February 2006 session*

- 7.2 At its February 2006 session the Executive Committee decided that some of the costs incurred in 2003 in respect of sealing the oil leaking from the wreck and various surveys and studies were admissible in principle, but that the claim for costs incurred in 2004 relating to the removal of oil from the wreck was inadmissible (document 92FUND/EXC.32/6, paragraph 3.28).
- 7.3 However, some delegations considered that it was important that the Funds were prepared to deal with similar claims in the future in a more flexible manner. To that end, those delegations expressed the view that the Director should be instructed to examine the existing admissibility criteria in respect of preventive measures and to submit to the Assembly detailed proposals for clarifying the criteria within the framework of the existing Conventions.

- 7.4 The Executive Committee instructed the Director to carry out an examination of the admissibility criteria relating to claims for costs of preventive measures, in particular for the extraction of oil from sunken vessels, with a view to enabling the 1992 Fund Assembly at its October 2006 session to discuss possible alternatives for the existing criteria for admissibility within the framework of the 1992 Conventions (document 92FUND/EXC.32/6, paragraph 3.2.81). The Director will submit a document to the Assembly dealing with this matter (document 92FUND/A.11.24).

*Further assessment of the claim*

- 7.5 In accordance with the Executive Committee's decision, an assessment is being carried out of the admissible costs of activities that had a bearing on the assessment of the pollution risk posed by the oil in the wreck, incurred by the Spanish Government in 2003 prior to the removal of oil from the wreck.

**8 Time bar**

- 8.1 Under the 1992 Civil Liability Convention, rights to compensation from the shipowner and his insurer are extinguished (time-barred) unless legal action is brought within three years of the date when the damage occurred (Article VIII). As regards the 1992 Fund Convention, rights to compensation from the 1992 Fund are extinguished unless the claimant either brings legal action against the Fund within this three-year period or notifies the Fund within that period of an action against the shipowner or his insurer (Article 6). Both Conventions also provide that in no case shall legal actions be brought after six years from the date of the incident.

- 8.2 In September 2005 individual letters about the time-bar issue were sent to all those who had submitted claims to the Claims Handling Offices in Spain and France and with whom settlements had not been reached by that time. Advertisements were placed in the national and local press in Spain and France drawing attention to the time-bar issue.

**9 Payments and other financial assistance by the Spanish authorities**

- 9.1 The Spanish Government and regional authorities made payments of €40 (£27) per day to all those directly affected by the fishing bans. These included shellfish harvesters, inshore fishermen and associated onshore workers with a high dependence on the closed fisheries, such as fish vendors, fishing net repairers and employees of fishing co-operatives, fish markets and ice factories. Some of these payments have been included in subrogated claims by the Spanish authorities pursuant to Article 9.3 of the 1992 Fund Convention.

- 9.2 The Spanish Government has also provided aid to other individuals and businesses affected by the oil spill in the form of loans, tax relief and waivers of social security payments.

- 9.3 In June 2003 and July 2004 the Spanish Government adopted legislation in the form of two Royal Decrees (Real Decreto-Ley) making available a total amount of €249.5 million (£169 million) to compensate in full certain categories of victims of the pollution. To receive compensation the claimants had to renounce the right to claim compensation in any other way in relation to the *Prestige* incident and had to transfer their rights of compensation to the Spanish Government. The Decrees provide that the assessment of claims will be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions.

- 9.4 At the February 2004 session of the Executive Committee the Spanish delegation mentioned that the Spanish Government had received almost 29 000 claims for compensation from victims of the *Prestige* incident who wished to use the payment mechanism set out in the first Royal Decree. It was also mentioned that of those claims, some 22 800 related to groups of workers in the fisheries sector which would be assessed by means of a system using either a formula or a scale ('estimación objetiva'). It was stated that some 5 000 claims of other groups would be subject to individual assessments.



- 9.5 In May 2005 the Spanish Government informed the 1992 Fund that agreements had been reached with some 19 500 workers in the fisheries sector and that payments totalling some €88 million (£60.5 million) had been made to them under the Royal Decrees. It is expected that the claims lodged in the legal proceedings before the Criminal Court in Corcubi3n (Spain) on behalf of these workers will be withdrawn following their settlement with the Spanish Government under the Royal Decrees (cf paragraph 12.1).
- 9.6 The 1992 Fund was informed by the Spanish Government in 2004 that claims which under the Decrees would be subject to individual assessment would be assessed by the Consorcio.
- 9.7 Since the Royal Decrees provide that the assessment of claims will be made following the criteria used to apply the 1992 Civil Liability and Fund Conventions, meetings have been held between representatives of the Consorcio and of the 1992 Fund to discuss the criteria. As at 15 September 2006 the Consorcio had provided details of the claims submitted as follows:

Category of claim	Number of claims
Mariculture (property damage & loss of income)	103
Fishing (property damage & loss of income)	179
Fish & shellfish vendors (loss of income)	310
Fish & shellfish processors (loss of income)	79
Employees fisheries sector (loss of income)	109
Tourism (loss of income)	86
Land (damage & loss of income during clean-up operations)	72
Property damage	14
Miscellaneous	19
<b>Total</b>	<b>971</b>

The total amount claimed is €230 million (£156 million).

- 9.8 The Consorcio requested the assistance of the experts appointed by the London Club and the 1992 Fund in the assessment of 241 of these claims for a total of €47.8 million (£32 million). A number of the claims referred to these experts were not supported by sufficient evidence to demonstrate the loss claimed. However, the experts of the Consorcio and the experts appointed by the London Club and the 1992 Fund have made joint assessments of 194 claims. One hundred and eighty-seven of these claims, for €20.3 million (£13.8 million), have been approved by the 1992 Fund and the London Club for €2.4 million (£1.6 million). One hundred and thirty-four claims included in the 241 claims with which the Consorcio has requested assistance have also been submitted directly to the Claims Handling Office. Details of 83 of these assessments have been provided to the Consorcio.
- 9.9 At the Executive Committee's May 2006 session the Spanish delegation informed the Committee that 381 of the claims assessed by the Consorcio had been rejected due to lack of supporting documentation or lack of evidence of the loss. That delegation also stated that, from the assessment of 90% of the claims examined through this procedure, it could be deduced that the maximum amount to be paid by the Spanish Government in respect of these claims would be some €50 million (£34 million).

## **10 Payments and other financial assistance by the French authorities**

- 10.1 The French Government introduced a scheme to provide payments in excess of the amounts paid by the 1992 Fund to claimants in the fishery and shellfish harvesting sectors who made a request to that effect by 13 December 2004. Payments were made in January 2005 to 175 claimants for a total amount of €1.15 million (£780 000).

- 10.2 The French Government informed the Director that these payments were advances on the payments to be made by the 1992 Fund and are to be repaid by the claimants and that the Government will not pursue subrogated claims against the 1992 Fund in respect of the payments made.

## **11 Investigations into the cause of the incident**

### *The Bahamas Maritime Authority*

- 11.1 An investigation into the cause of the incident was carried out by the Bahamas Maritime Authority (ie the authority of Flag State). The report of the investigation was published in November 2004 and a summary of the findings was presented at the March 2005 session of the Executive Committee (document 92FUND/EXC.28/5, paragraphs 13.1.1 – 13.1.7).

### *The Spanish Ministry of Public Works*

- 11.2 The Spanish Ministry of Public Works (Ministerio de Fomento) carried out an investigation into the cause of the incident through the Permanent Commission on the Investigation of Maritime Casualties that has the task of determining the technical causes of maritime accidents. A brief summary of the report's conclusion on the investigation was presented to the Executive Committee at its June 2005 session (document 92FUND/EXC.29/4, paragraphs 13.2.1 – 13.2.5).

### *The Criminal Court in Corcubión*

- 11.3 The Criminal Court in Corcubión in Spain is carrying out an investigation into the cause of the incident in the context of criminal proceedings. The Court is investigating the role of the master of the *Prestige*, of a civil servant who was involved in the decision not to allow the ship into a port of refuge in Spain and a manager of the ship's management company.

### *The French Ministry of Transport and the Sea*

- 11.4 The French Ministry of Transport and the Sea (Secrétariat D'État aux Transports et à La Mer) carried out a preliminary investigation into the cause of the incident through the General Inspectorate of Maritime Affairs – Bureau of investigations – accidents/sea (Inspection générale des services des affaires maritimes – Bureau enquêtes – accidents / mer (BEAmer)). A brief summary of the report on the investigation was presented to the Executive Committee at its June 2005 session (document 92FUND/EXC.29/4, paragraphs 13.4.1 – 13.4.10).

### *Examining magistrate in Brest*

- 11.5 An examining magistrate in Brest is carrying out a criminal investigation into the cause of the incident.

### *The 1992 Fund's involvement*

- 11.6 The 1992 Fund continues to follow the ongoing investigations through its Spanish and French lawyers.

## **12 Court actions**

### *Spain*

- 12.1 Some 2 360 claims have been lodged in the legal proceedings before the Criminal Court in Corcubión (Spain). Three hundred and seventy-eight of these claims involve persons who have submitted claims directly to the London Club and 1992 Fund through the Claims Handling Office in La Coruña. Details of the losses allegedly suffered in respect of some of these court actions have been provided to the Court and are being examined by the experts engaged by the London Club and the 1992 Fund. In September 2005, the largest group of victims in the fisheries, shellfish harvesting and fish-farming sector submitted a document to the Instructing Magistrate in Corcubión in which it

was stated that the group members had signed settlement agreements with the Spanish State, and that in accordance with those agreements, any action or compensation to which these victims could be entitled as a result of the *Prestige* incident, against the Spanish State as well as against the 1992 Fund, were withdrawn. The withdrawal affected some 13 700 persons, covering approximately 75% of the fisheries sector affected by the *Prestige* incident. A number of other claimants who have settled with the Spanish Government under the Royal Decrees have withdrawn their claims from the court proceedings. It is expected that more claimants will withdraw their court actions for the same reason.

- 12.2 The Spanish Government has taken legal action in the Criminal Court in Corcubi3n on its own behalf and on behalf of regional and local authorities as well as on behalf of 971 other claimants or groups of claimants. A number of other claimants have also taken legal actions and the Court is assessing whether these claimants are eligible to join the proceedings.

#### *France*

- 12.3 At the request of a number of communes, the Administrative Court in Bordeaux appointed experts to establish the extent of the pollution at various locations in the affected area.
- 12.4 The French Government and 224 other claimants have taken legal action against the shipowner, the London Club and the 1992 Fund in 15 courts in France requesting compensation totalling some €30 million (£88 million), including €7.7 million (£45.9 million) claimed by the Government.
- 12.5 In March 2003 two oyster farmers unions and an association brought an action, which is also included in the actions referred in paragraph 12.4, against the shipowner, the London Club, the owner of the cargo/charterer of the vessel, the Spanish State, the American Bureau of Shipping (ABS), the classification society of the *Prestige* and Bureau Veritas, the previous classification society that had certified the *Prestige* before ABS. In June 2006 the Fund was joined in the proceedings as a defendant.

#### *Portugal*

- 12.6 The Portuguese State took legal action in the Maritime Court in Lisbon against the shipowner, the London Club and the 1992 Fund claiming compensation for €4.3 million (£2.9 million). Following the settlement of the claim referred to in paragraph 6.15, the Portuguese State has applied to the court for the action to be withdrawn.

#### *United States*

- 12.7 The Spanish State has taken legal action against ABS before the Federal Court of first instance in New York requesting compensation for all damage caused by the incident, estimated initially to exceed US\$700 million (£374<sup><7></sup> million) and estimated later to exceed US\$1 000 million (£534 million). The Spanish State has maintained *inter alia* that ABS had been negligent in the inspection of the *Prestige* and had failed to detect corrosion, permanent deformation, defective materials and fatigue in the vessel and had been negligent in granting classification.
- 12.8 ABS denied the allegation made by the Spanish State and in its turn took action against the State, arguing that if the State had suffered damage this was caused in whole or in part by its own negligence. ABS made a counterclaim and requested that the State should be ordered to indemnify ABS for any amount that ABS may be obliged to pay pursuant to any judgement against it in relation to the *Prestige* incident. The New York Court dismissed the counterclaim by ABS on the ground that the Spanish State was entitled to sovereign immunity. ABS sought reconsideration by the Court or permission to appeal.

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<7> The conversion of the US\$ has been made on the basis of the exchange rate as at 13 September 2006 (£1 = US\$0.5341).

- 12.9 In August 2005 ABS submitted a request to the New York Court for a summary judgement dismissing the Spanish State's action. ABS argued that it was an agent or servant of the shipowner and that therefore in accordance with Article III.4(a) of the 1992 Civil Liability Convention no claim for compensation for pollution damage could be made against it unless the damage resulted from ABS's personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result. ABS also maintained that since the United States was not a Contracting State to the Civil Liability Convention and the pollution damage had occurred in Spain, the United States Courts were not competent to hear the case. The Court has not yet taken a decision on the request.
- 12.10 In July 2006 the New York Court confirmed its decision on the Spanish State entitlement to sovereign immunity, but granted ABS permission to resubmit its counterclaim on different grounds. The Court stated that the protection of foreign states from suit is subject to certain exceptions, mainly that a foreign state will be susceptible to a counterclaim if that claim arises out of the same transaction that is the subject matter of the claim by the foreign state or to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state. The Court also stated that although both sets of claims related to the *Prestige* incident, they did not arise from the same transaction; whereas ABS's claim was based on the alleged duties of the Spanish State in connection with vessels in distress, the Spanish State's claim was based on ABS's deviation from the proper practices of classification societies.
- 12.11 In July 2006 ABS resubmitted its counterclaim requesting that ABS should be indemnified by the Spanish State in the event any third party obtained a judgement against ABS as a result of the incident. In September 2006 the Spanish State requested that the ABS counterclaim should be dismissed on the grounds of the Court's lack of jurisdiction on the matter. The New York Court has not yet taken any decision in respect of this request.
- 12.12 As part of the discovery procedure in the New York litigation, ABS requested production by the Spanish State of all documents and material forming part of the file of the Criminal Court in Corcubi3n investigating the *Prestige* incident, as well as all the documents and material reviewed by the Spanish Permanent Commission for the Investigation of Maritime Accidents. The Spanish State responded, asserting that the requested documents and material were protected from disclosure by privilege under Spanish procedural law. ABS opposed the assertion of privilege. In a decision rendered in August 2005, after having taken into account the various competing interests involved, the judge supervising discovery denied the Spanish State's assertion of privilege and ordered the production of the documents. The judge then denied Spain's request for reconsideration. The Spanish State appealed against this decision.
- 12.13 In September 2005, the Spanish State submitted a petition to the Criminal Court in Corcubi3n maintaining that these documents and material were privileged under Spanish procedural law and could not be provided to ABS and requested the Criminal Court to take a decision on this issue. In a decision rendered in September 2005, the Court decided that these documents and material were privileged to the parties who had joined in the criminal proceedings and should therefore not be made available to ABS. It follows from the decision that ABS could get access to the documents and material by joining the proceedings in Corcubi3n as an interested party.
- 12.14 In a decision rendered in August 2006, the New York Court rejected the appeal by the Spanish State. The Court considered that both parties to the proceedings should have access to the same material and that failure by the Spanish State to make the documents and material requested available to ABS would place ABS in a situation of unfair disadvantage in that it would affect ABS's right of defence. The Court ordered the Spanish State to produce the documents and material by 30 September 2006.
- 12.15 The Spanish State reviewed its position and in August 2006 submitted a request to the Court in Corcubi3n to be authorised to disclose to ABS the documents and material referred to in paragraph 12.12. Reference was made to the fact that the decision of the New York Court was final and not subject to appeal. The Spanish State argued that the decisions by the New York Court and the Corcubi3n Court placed the Spanish State in a difficult position in that a New York Court had

ordered the State to do something, namely to disclose all documents in the Corcubión Court file, and the Court in Corcubión had ordered the State to do the contrary, namely not to disclose those documents. The point was made that a State was represented by civil servants, who had the obligation to comply with all court decisions. The Spanish State mentioned that a confidentiality agreement had been concluded between the State and ABS in respect of any documents and material disclosed. The Spanish State further argued that if the documents and materials requested were not made available, it would damage the Spanish State's position before the New York Court. The Court in Corcubión is considering the State's request.

- 12.16 Regional authorities of the Basque Region (Spain) took legal action against ABS in the Federal Court of first instance in Houston, Texas, claiming compensation for clean-up costs and payments made to individuals and businesses for US\$50 million (£26.7 million). The authorities argued *inter alia* that ABS had been in breach of its duty to inspect the *Prestige* adequately and had classified the vessel as seaworthy when it was not. This legal action was transferred to the New York Court dealing with the claim by the Spanish State referred to above.
- 12.17 As a result of the settlement with the Spanish State referred to in paragraph 6.7 the Basque Region requested the Court to dismiss its action without prejudice, in order to protect its right to pursue a further action for indirect damages that could be caused by the *Prestige* incident and that were not compensated through the settlement agreement with the Spanish Government. However, in August 2006 the New York Court dismissed the action by the Basque Region with prejudice. Since the Court dismissed the case with prejudice, the Basque Region will not be able to pursue future actions against ABS in the United States in relation to the *Prestige* incident.
- 12.18 In June 2006 the Spanish State submitted a request to the New York Court that the Court should order ABS to produce financial records. The Spanish State argued that the financial records would demonstrate that ABS had diverted revenue and resources, and that, as a result, ABS had not adequately addressed surveyor training and staffing deficiencies. ABS maintained that the financial records were not relevant at the liability stage of the litigation.
- 12.19 The New York Court denied the Spanish State's request, stating that the financial records were not relevant to the issue of whether or not there were deficiencies in ABS's performance in respect of the *Prestige*. The Court stated that the litigation in question concerned the design, construction, operation, maintenance and inspection of the *Prestige* and that discovery in this case should be limited to records containing information relating to the allegations in the complaint and the circumstances surrounding the *Prestige* incident. The Spanish State has not appealed against this decision.

### **13 Recourse action by the 1992 Fund against ABS**

- 13.1 In October 2004 the Executive Committee decided that the 1992 Fund should not take recourse action against the American Bureau of Shipping (ABS) in the United States. It further decided to defer any decision on recourse action against ABS in Spain until further details surrounding the cause of the *Prestige* incident came to light. The Committee stated that this decision was without prejudice to the Fund's position vis-à-vis legal actions against other parties (document 92FUND/EXC.26/11, paragraphs 3.7.42 – 3.7.72).
- 13.2 The Director was instructed to follow the ongoing litigation in the United States, monitor the ongoing investigations into the cause of the incident and take any steps necessary to protect the 1992 Fund's interests in any relevant jurisdiction.

### **14 Action to be taken by the Executive Committee**

The Executive Committee is invited:

- (a) to take note of the information contained in this document; and

- (b) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.

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